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IN THE

Supreme Court of the United States

LONNIE LEE BURTON,

Petitioner,

vs.

DOUGLAS WADDINGTON, Superintendent,
Stafford Creek Corrections Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the district court lacked subject mater jurisdiction over the habeas corpus petition where Burton had previously filed a habeas corpus petition challenging his custody, and he did not obtain leave from the Ninth Circuit to file the current petition as required by 28 U. S. C. § 2244(b).

2. Whether *Blakely* v. *Washington*, 542 U. S. 296 (2004) applies retroactively in collateral proceedings filed under 28 U. S. C. § 2254 to cases where the state court judgment became final, and the state court adjudication of the merits of the claim occurred, prior to the issuance of the Court's decision in 2004.

3. Assuming *Blakely* v. *Washington* does apply retroactively, whether the state court adjudication of Burton's claim was contrary to or an unreasonable application of the holding in *Blakely* where each individual sentence imposed on Burton did not exceed the standard sentencing range for the particular offense.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Amicus CJLF has a particular interest in the retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the deference standard of 28 U. S. C. § 2254(d). In *Teague*, *amicus*

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

submitted the brief proposing the rule adopted in that case. See 489 U. S., at 300. Counsel for *amicus* wrote one of the few law review articles defending § 2254(d) as it was written and intended, at a time when it was under severe attack in the law reviews. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). *Amicus* CJLF has filed a brief in most of this Court's major habeas cases from 1988 to the present.

The decision in *Blakely* v. *Washington* has been called a "train wreck," among other terms, for its damage to sentencing reforms achieved after many years of efforts had finally reached a bipartisan consensus. While these sentencing systems can be repaired prospectively to make the adjustments *Blakely* requires, a fully retroactive application of *Blakely* would require reexamination of every above-standard-range sentence in every jurisdiction with such a reform. The already overburdened system would buckle under such added weight, and many criminals would have their sentences reduced to much less than their actual crimes and criminal histories warrant.

In addition, to reach the *Blakely* issue in this case, the Court would have to decide that every defendant who receives a penalty reversal from the state appellate court can file two federal habeas petitions as a matter of routine: a guilt petition immediately and a sentencing petition after resentencing and review of the new sentence. This would be a serious weakening of the exhaustion and successive petition rules, contrary to the clear intent of Congress in enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

According to the Washington Court of Appeals opinion on direct appeal, Joint Appendix ("J. A.") 44:

"On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchase[] the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home.

"He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C. by force. After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police."

Burton was convicted of rape, robbery, and burglary, all in the first degree. The trial court had to resentence Burton when a prior conviction used in sentencing was overturned and again when the second sentence was reversed on appeal. This case involves the third sentence of 304 months for rape, 153 months for robbery, and 105 months for burglary, served consecutively for a total of 562 months, or 46 years and 10 months. J. A. 45.

Burton has an extensive criminal history. The trial court noted, but did not count, two other cases of rape of a child—one dismissed when the victim "became unavailable" and one reversed on appeal. See J. A. 24, ¶¶6 and 8. The crimes counted by the trial court included rape of a child, sexual exploitation of a minor, child molestation, fraud, theft, and forgery, in addition to the counts in the present case. See J. A. 26, ¶14.

The Washington sentencing system has a grid that produces a standard-range sentence from a row representing the seriousness of the primary offense and a column representing an

"offender score," which includes both unrelated offenses and the secondary offenses in the present case. See *Blakely* v. *Washington*, 542 U. S. 296, 299 (2004); J. A. 49-51. Burton's unrelated offenses alone would have earned him an offender score of 12, but the robbery and burglary counts in the present case raised that score to 16. See J. A. 49-50. However, there is no difference in the sentence between offender scores 12 and 16 on the standard grid. The last column is "9 or more." J. A. 51. Applying the grid without correction would have meant no punishment at all for the robbery and burglary, *i.e.*, "free crimes with no additional penalty." J. A. 52. To avoid this result, the trial court imposed an "exceptional sentence" by making the sentences for the three courts run consecutively. J. A. 30, ¶ 16; J. A. 32.

The state Court of Appeals found that the consecutive sentences were valid under state law based on Burton's convictions in the present and prior cases. Additional aggravating factors mentioned by the trial judge were not legally necessary for the sentence. J. A. 52-53.

On December 23, 1998, while the appeal of the final sentencing was pending, Burton filed a federal habeas corpus petition challenging his conviction. J. A. 38-41. The form expressly warns that state remedies must be exhausted first and that omitted claims may be barred later. J. A. 37-38. This petition was denied April 6, 2000. J. A. 42. The Court of Appeals affirmed.

Back in state court, the judgment was affirmed on direct appeal July 17, 2000. J. A. 43. The Washington Supreme Court denied discretionary review December 5, 2000. Burton did not file a certiorari petition in this Court, and the time to do so expired March 5, 2001.

Burton filed a personal restraint petition in the Washington Court of Appeals, which was denied. App. to Brief for Petitioner 1a. A commissioner of the Washington Supreme Court denied review, citing *State* v. *Gore*, 143 Wash. 2d 288,

21 P. 3d 262 (2001), for denial of the *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) claims. The Washington Supreme Court denied petitioner's motion to modify this ruling on October 8, 2002. App. to Brief for Petitioner 4a.

Burton filed a second federal habeas petition, challenging the sentence. The magistrate judge rejected the state's claim that the petition was "second or successive," J. A. 68, but recommended denial. J. A. 76. The District Court adopted the recommendation. J. A. 77. The Court of Appeals affirmed, J. A. 82, and the court denied rehearing en banc. J. A. 83. This Court granted Burton's petition for certiorari on June 5, 2006.

SUMMARY OF ARGUMENT

Jurisdiction is lacking in this case. Petitioner chose to file a petition challenging the guilt determination before he exhausted state remedies on his sentence. Under these circumstances, a second petition challenging the sentence is successive and cannot be filed in the District Court without authorization from the Court of Appeals.

Burton could not obtain relief without creating a rule that is new beyond *Blakely*. When an enhanced sentence is legally permissible based entirely on convictions in the present and prior cases, such a sentence is not error under *Apprendi* or *Blakely*. Extending those rules to cover this situation would require overruling *Almendarez-Torres* v. *United States*, and that would be a new rule.

Blakely was not dictated by precedent existing in 2001, when Burton's sentence became final. Although there is language in *Apprendi* to support the result in *Blakely*, that is not enough under this Court's "new rule" precedents. There were enough contrary indications in *Apprendi* that reasonable minds could differ as to whether the rule would be carried that far. The split of authority in the states combined with the unanimous view of the federal circuits confirms this. For much

the same reasons, *State* v. *Gore* and the state court's reliance on it in this case were neither contrary to an unreasonable application of clearly established federal law as of October 2002.

The *Blakely* rule is not an "absolute prerequisite to fundamental fairness" so as to qualify for the second exception to the rule of *Teague* v. *Lane*. The bipartisan consensus that the sentencing systems at issue in *Blakely* and *Booker* were salutary reforms, more fair than the clearly constitutional systems they replaced, refute any such argument.

The rule of 28 U. S. C. § 2254(d) is independent of *Teague*. Congress chose to omit the *Teague* exceptions. Courts cannot read in what Congress chose to omit.

ARGUMENT

I. The District Court did not have jurisdiction to consider this successive petition.

The trial court entered the sentence which is the subject of the present petition on March 31, 1998. J. A. 33. Nine months later, while his appeal on the sentence was pending (the conviction having been affirmed earlier), Burton filed a federal habeas petition stating three grounds relating to the conviction plus "cumulative error." J. A. 39. The form he filled out contains this warning: "CAUTION in order to proceed in federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition you may be barred from presenting additional grounds at a later date." J. A. 37-38. This petition was denied April 6, 2000, J. A. 42, and the Ninth Circuit affirmed May 30, 2001. See Opp. to Pet. for Cert. 2.

Petitioner argues for a breathtaking expansion of the very limited rule of *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), one that would largely defeat the objective of avoiding piecemeal litigation. The general rule that piecemeal habeas

petitions will not be allowed and that all challenges to a judgment must be brought in one petition has been clear at least since *Rose* v. *Lundy*, 455 U. S. 509 (1982). To implement the underlying policies of the habeas statute, see *id.*, at 519-520, *Lundy* adopted a total exhaustion rule. This rule "provides a simple and clear instruction to potential litigants: before you bring *any* claims to federal court, be sure you first have taken *each one* to state court." *Id.*, at 520 (emphasis added). This rule is simple enough for *pro se* prisoners to understand, see *ibid.*, and it is plainly set forth in the standard form provided to them. See J. A. 38. *Lundy* also made clear that if the prisoner chooses to go forward in federal court with only the exhausted claims, "the prisoner would risk forfeiting consideration for his unexhausted claims in federal court." 455 U. S., at 520.

The statute of limitations in the AEDPA was intended to promote, not inhibit, the policy against piecemeal habeas litigation, and this court interpreted AEDPA to advance that purpose in *Duncan* v. *Walker*, 533 U. S. 167, 180 (2001). "A diminution of statutory incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce. Cf. *Rose*, 455 U. S., at 520. . . . We do not believe that Congress designed the statute in this manner."

"AEDPA preserved *Lundy*'s total exhaustion requirement . . . , but it also imposed a 1-year statute of limitations . . . ." *Rhines* v. *Weber*, 544 U. S. 269, 274 (2005). To deal with the "interplay" between these requirements, *Rhines* authorized a " 'stay and abeyance' procedure" in the circumstances of that case. See *id.*, at 275. However, Rhines' situation was quite different from Burton's. The judgment in Rhines' case, including both conviction and sentence, had become final long before he filed his federal habeas petition. See *id.*, at 272. The state remedies he needed to exhaust were collateral, not direct appeal. The federal habeas limitation clock was ticking while the federal court considered the exhaustion question.

Burton, on the other hand, had no need for "stay-and-abeyance," so the pre-*Rhines* doubt over the availability of that procedure is irrelevant. The clock does not start until "the date on which the *judgment* became final by the conclusion of direct review . . . ." 28 U. S. C. § 2244(d)(1)(A) (emphasis added). The meaning of the word "judgment" in this context has long been settled. "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U. S. 211, 212 (1937).

Petitioner maintains that he was in danger of having his guilt-phase claims dismissed as untimely if he had waited to file a single petition after his appeal from the resentencing proceeding was completed. See Reply in Support of Pet. for Cert. 10. The magistrate judge accepted this argument. See J. A. 66. Yet neither he nor petitioner cites a single case where any federal court has actually denied federal review of any guilt-phase claim for failure to seek such review while appeal of the sentence was pending. Petitioner claims that uncertainty on this point was not resolved until *United States* v. *Colvin*, 204 F. 3d 1221 (CA9 2000). See Reply in Support of Pet. for Cert. 11. The *Colvin* opinion does not read like it is resolving any uncertainty on this point. The disputed issue in *Colvin* was when a judgment becomes final if the Court of Appeals decision resolves all disputed issues but remands to the District Court for a ministerial act. See 204 F. 3d, at 1224. In the course of the discussion, the court mentioned matter-of-factly that the judgment is not final "as long as a defendant may appeal either the conviction or sentence," *ibid.*, and nothing more than a bare citation to Federal Rule of Criminal Procedure 32(d)(1) was deemed necessary to support this obvious and undisputed statement. See *id.*, at 1224, n. 3.

The unity of the criminal judgment is clear from this Court's precedents on direct appeal. For example, in *Flanagan* v. *United States*, 465 U. S. 259 (1984), the Court noted, "In a criminal case the [final judgment] rule prohibits appellate review until conviction *and imposition of sentence*." *Id.*, at 263

(emphasis added) (citing *Berman*, *supra*). Conviction and sentence are parts of a single criminal case, and *Mitchell* v. *United States*, 526 U. S. 314, 327 (1999), declared that arguing they were separate was "contrary to the law and to common sense." Although the Court *allowed* the defendant to seek review by certiorari when the penalty verdict had been reversed in *Brady* v. *Maryland*, 373 U. S. 83, 85, n. 1 (1963), it had to resort to the "collateral order" doctrine to do so. It does not appear that the Court has ever suggested, much less held, that a defendant in this situation *must* seek separate review of the guilt determination or forfeit his right to seek guilt-phase review after resentencing.

Acts of Congress and the policies that underlie them cannot be brushed aside on the speculative apprehension that a court might construe the term "judgment" in a manner contrary to its long-settled usage. Congress preserved and strengthened the exhaustion rule at the same time it enacted the statute of limitations. Statutes cannot be rewritten by the courts even when they *really do* create harsh results. See *Dodd* v. *United States*, 545 U. S. 353, 125 S. Ct. 2478, 2483, 162 L. Ed. 2d 343, 350-351 (2005). *A fortiori*, a court should not subvert a statute to avoid a purely imaginary dilemma.

The Court of Appeals did not mention the nonexistent dilemma, but instead it matter-of-factly made a breathtaking expansion of the rule of *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), an expansion that would authorize two federal habeas petitions in *every* case where a state appellate court affirms the conviction but reverses the sentence. The Court of Appeals said the new petition was not "second or successive" within the meaning of 28 U. S. C. § 2244(b)(3)(A) because the sentencing claim was not "ripe" at the time of the first petition. See J. A. 79. This "ripeness" problem arose because the sentencing claims were unexhausted at the time the guilt-phase claims were presented in federal habeas. The authority for the proposition that the second petition is not "second or successive" is *LaGrand* v. *Stewart*, 170 F. 3d 1158,

1159 (CA9 1999), which in turn is based on the Ninth Circuit's opinion in *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628 (CA9 1997), aff'd, 523 U. S. 637 (1998).

LaGrand is doubtful authority in light of the fact that this Court vacated the stay, see *Stewart* v. *LaGrand*, 525 U. S. 1173 (1999), Karl LaGrand was executed, and the then-moot petition for certiorari was dismissed upon request of the state. See *Stewart* v. *LaGrand*, 526 U. S. 1061 (1999). In any event, both *LaGrand* and *Martinez-Villareal* are readily distinguishable, and they cannot be read to declare open season for piecemeal habeas review of state criminal judgments.

Both cases involve attacks on the execution of the judgment and not the judgment itself. *Martinez-Villareal* involved a "competency to be executed claim." See 523 U. S., at 641. Such a claim does not attack the judgment of the court but only claims it cannot be executed so long as the prisoner remains mentally incompetent. Because mental competence is a changeable condition, such a claim is premature until execution is imminent, which necessarily means after the attacks on the judgment have been litigated. See *id.*, at 644-645.

Method of execution claims also are not attacks on the judgment. See *Hill* v. *McDonough*, 547 U. S. __, 126 S. Ct. 2096, 2103-2104, 165 L. Ed. 2d 44, 53-54 (2006). That is why they do not necessarily have to be brought in habeas corpus. See *ibid.* They are "ripe" as soon as the judgment is entered or the state changes its method, whichever is later. Method of execution claims are different from attacks on the judgment, and *LaGrand* provides no support for jurisdiction in the present case.[2]

Reversals for resentencing while affirming the conviction are not at all unusual. In capital cases, the "annually improvised Eighth Amendment 'death is different' jurisprudence,"

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2. The question of whether the Ninth Circuit's successive petition holding in *LaGrand* was correct was largely mooted by *Hill*.

Morgan v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), has been a cause of such reversals for many years. Now that noncapital sentencing law has grown more complex, such reversals are common in all criminal cases. If the defendant in *every* such case can file two federal habeas petitions as a matter of routine, which is what the Ninth Circuit held in this case, the implications are staggering. The burden on the states to marshal their resources to keep their convicts in prison, which is already substantial, see *Beard* v. *Banks*, 542 U. S. 406, 413 (2004), will be greatly increased.

Burton was clearly and expressly warned that proceeding with his guilt-phase claims before he exhausted state remedies on his sentencing claims might preclude federal review of the latter. He chose to go ahead. The present petition is successive. The District Court had no jurisdiction to consider it without an authorization from the Court of Appeals, which Burton did not seek or obtain and which he would not have qualified for. The case should be remanded to dismiss for lack of jurisdiction.

II. *Almendarez-Torres* precludes a finding of *Blakely* error in this case, making it a poor vehicle to resolve the question presented.

The trial judge in the present case gave three reasons for imposing an "exceptional sentence": "[t]he defendant's long criminal history, combined with the 'multiple offense policy,' " J. A. 29, "deliberate cruelty," J. A. 30, and "sophistication and planning." J. A. 31. However, the Court of Appeals dismissed Burton's challenge to the latter two, upholding the trial court's ruling that first reason is sufficient, standing alone, to justify the sentence as a matter of state law. See J. A. 52-53. This holding is binding on the federal habeas court. See *Bradshaw* v. *Richey*, 546 U. S. __, 126 S. Ct. 602, 604, 163 L. Ed. 2d 407, 411-412 (2005) (*per curiam*).

In *Almendarez-Torres* v. *United States*, 523 U. S. 224, 239 (1998), the defendant anticipated the holding of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and argued that the sentencing factor in his case had to be treated as an element of the offense and be proven to a jury beyond a reasonable doubt. The Court rejected that argument as applied to the factor of recidivism. See *Almendarez-Torres*, *supra*, at 243-244. Although the *Apprendi* opinion would later make disparaging remarks about *Almendarez-Torres*, see 530 U. S., at 487, 489-490, it did not overrule that case, see *id.*, at 490 (exception for prior conviction), and it remains a precedent of this Court to this day. See *Rangel-Reyes* v. *United States*, 547 U. S. __, 126 S. Ct. 2873, 2874, 165 L. Ed. 2d 910, 911 (2006) (Stevens, J., respecting denial of certiorari). Whatever arguments may be made for overruling *Almendarez-Torres*, see *id.*, 126 S. Ct., at 2874-2875, 165 L. Ed. 2d, at 911-912 (Thomas, J., dissenting), that step cannot be taken on habeas corpus.

A case overruling a precedent of this Court *per se* makes a new rule. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, p. 7. *Almendarez-Torres* does not negate any "absolute prerequisite to fundamental fairness," see *infra*, at 20, that would even arguably qualify a contrary rule for the second exception to *Teague* v. *Lane*, 489 U. S. 288 (1989). See *Rangel-Reyes*, 126 S. Ct., at 2874, 165 L. Ed. 2d, at 911 (opn. of Stevens, J.) (no "significant risk of prejudice to the accused"). Further, it is clear beyond dispute that a state-court decision denying an *Apprendi* claim in a case where the sentencing factor is a prior conviction is not contrary to or an unreasonable application of the body of precedent including *Almendarez-Torres*. Cf. 28 U. S. C. § 2254(d)(1). Quite the contrary, all other courts of the nation *must* follow *Almendarez-Torres* unless and until this Court overrules it. See *Agostini* v. *Felton*, 521 U. S. 203, 237 (1997).

Regardless of whether *Blakely* is retroactive, granting relief to Burton would require a rule that is new beyond *Blakely*. The

Blakely retroactivity question should not be decided in a case where nothing depends on it. Cf. *Teague*, 489 U. S., at 316. Even if the Court has jurisdiction, but see *supra*, Part I, the writ of certiorari should be dismissed as improvidently granted.

III. The *Blakely* rule was neither "dictated by precedent" in 2001 nor "clearly established" in 2002.

A. Teague v. Lane.

> "Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. . . . First, the court must determine when the defendant's conviction became final. Second, it must ascertain the 'legal landscape as it then existed,' . . . and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. . . . That is, the court must decide whether the rule is actually 'new.' Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity." *Beard* v. *Banks*, 542 U. S. 406, 411 (2004) (citations omitted).

Step one is straightforward. The Washington Supreme Court denied discretionary review on December 5, 2000. The case became "final" for retroactivity purposes upon the expiration of time to file a certiorari petition, see *ibid.*, which was 90 days later, on March 5, 2001. This date is about nine months after *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), fifteen months before *Ring* v. *Arizona*, 536 U. S. 584 (2002), over three years before *Blakely* v. *Washington*, 542 U. S. 296 (2004), and almost four years before *United States* v. *Booker*, 543 U. S. 220 (2005).

The landscape of "*Apprendi*-land"[3] on March 5, 2001, was rather sparse. None of the state guidelines cases that later

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3. See *Ring*, 536 U. S., at 613 (Scalia, J., concurring).

formed the split of authority resolved in *Blakely*, see Pet. for Cert. in *Blakely* v. *Washington*, No. 02-1632, pp. 7-10, had yet been decided. The federal circuits were rapidly and unanimously deciding that *Apprendi* did *not* overturn the Federal Sentencing Guidelines. See *United States* v. *Penaranda*, 375 F. 3d 238, 243, n. 5 (CA2 2004) (collecting cases). Given that this Court's holding in *Booker* was contrary to the unanimous view of the circuits in the immediate aftermath of *Apprendi*, a new rule must have been created at some point between *Apprendi* and *Booker*.

Which of the steps from *Apprendi* to *Ring* to *Blakely* to *Booker* was a new rule? Petitioner contends that *Blakely* was dictated by *Apprendi* and that the big conceptual leap came in *Booker*. See Brief for Petitioner 25. *Amicus* CJLF believes that each of these steps was new within the meaning of *Teague*, but the question before the Court is merely the newness of *Blakely* after *Apprendi*. For perspective on that question, it is useful to return to the day *Blakely* was announced. Professor Douglas Berman, who specializes in sentencing law, had this to say on his widely read blog:

> **"Blakely..... WOW!!**
>
> "The Supreme Court handed down *Blakely v. Washington* this morning, and the only word that summarizes the ruling is WOW. Here is a link to all the opinions in Blakely, which essentially holds that ***any and every*** fact which increases the legally available sentence must be found by a jury or admitted by the defendant. In other words, it will no longer be constitutional for guideline sentencing systems to allow *judges* to find facts which increase applicable sentencing ranges. Of course, this is how nearly every sentencing guideline system works, and thus the ramifications of this decision for modern sentencing reforms cannot be overstated.
>
> "Each of the four opinions --- Scalia for the majority, O'Connor, Kennedy and Breyer all dissenting --- is rich

> with intriguing ideas, compelling arguments and rhetorical flourishes. Sentencing scholars and also constitutional scholars are likely to be talking about this opinion for a long time. And, of course, Blakely will not be the last word on these subjects. There will be lots and lots more litigation (some of which will surely make its way again to the Supreme Court) about what this rule now means for the operation of structured sentencing systems. Stay tuned." D. Berman, *Blakely*..... WOW!!, Sentencing Law & Policy (June 24, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/blakely_wow.html (as visited Sept. 19, 2006) (emphasis in original).

That would be a most curious reaction to a decision that "broke no new legal ground." Cf. Brief for Petitioner 20. Professor Frank Bowman had a decidedly less positive view of *Blakely* but no lesser estimate of the magnitude of the change. See Bowman, Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of *Blakely v. Washington*, 41 Am. Crim. L. Rev. 217 (2004).

The reaction of the federal courts of appeals in the wake of *Blakely* is similarly informative. Cases are collected in Justice Breyer's *Booker* dissent. See 543 U. S., at 329. In *United States* v. *Ameline*, 376 F. 3d 967, 973 (2004), the Ninth Circuit said, "With its clarification of a defendant's Sixth Amendment rights, the *Blakely* court worked a sea change in the body of sentencing law." (Footnote omitted.) The Fifth Circuit said, "Undeniably, *Blakely* strikes hard at the prevailing understanding of the Guidelines." *United States* v. *Pineiro*, 377 F. 3d 464, 470 (2004). If *Blakely* had merely been a simple, straightforward application of *Apprendi*, it could not have "struck hard" at the Guidelines, because the blow would already have landed in *Apprendi* itself. The Seventh Circuit opinion in *Booker* says it most directly. After discussing the understanding of "statutory maximum" implicit in *Edwards* v. *United States*, 523 U. S. 511 (1998), Judge Posner's opinion says, "That was of course the understanding before *Blakely, but Blakely redefined*

'*statutory maximum.*' " *United States* v. *Booker*, 375 F. 3d 508, 514 (2004) (emphasis added).

The argument that *Apprendi* dictated *Blakely* is, in essence, that if one lifts *Apprendi*'s statement of its rule from the opinion, puts on blinders to block all other considerations, and plugs it in to the facts of *Blakely*, the result pops out. See Brief for Petitioner 18-19. The development of constitutional law does not follow such a simplistic path. There are always competing considerations, and as the application of a rule gets further from the core principles that produced it, there often comes a point where those other considerations preclude further expansion of the rule. As the cat creeps farther out on the tree limb and away from the trunk, it gets to a point where the limb breaks.

The exclusionary rule cases illustrate that principles are not always extended to their logical extreme. Reading Justice Clark's sweeping language in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), one might very well conclude that evidence obtained in violation of the Fourth Amendment was excluded in all proceedings before all tribunals in the United States. See, *e.g.*, *id.*, at 654-655 ("close the only courtroom door remaining open"). It did not happen. The costs and benefits were weighed at each decision point, and the decisions were generally against exclusion. See, *e.g.*, *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 362-365, 369 (1998); *Hudson* v. *Michigan*, 547 U. S. __, 126 S. Ct. 2159, 2168, 165 L. Ed. 2d 56, 69 (2006).

Even though the Court may decide in a case that the result logically follows from a precedent, that is not enough to preclude a conclusion that the rule is new for *Teague* purposes. See *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990). Contrary indications in this Court's case law may be sufficient for reasonable jurists to conclude that the earlier precedent would not be extended as far as it later was. See *Ibid.*

There are muitiple indications within *Apprendi* itself that its rule might not extend to a guidelines system such as the case in *Blakely*. The opinion implies that functional equivalence to a greater degree of offense is the characteristic that triggers its rule, and that sentencing systems where the factors are not so equivalent are distinguishable. See 530 U. S., at 494, n. 19. In a guidelines system in which the judge is free to consider *any* aggravating factors, not just those on a statutory list, the factors do not resemble the elements of an offense. If the vagueness test for the definition of offenses applied, see 1 W. LaFave, Substantive Criminal Law § 2.3(a), pp. 144-146 (2d ed. 2003), an authorization to consider any relevant aggravating fact would fail. Such an authorization is infinitely vague.

Second, *Apprendi* expressly rejected the argument that its rule was inconsistent with *Walton* v. *Arizona*, 497 U. S. 639 (1990). See 530 U. S., at 496-497. The distinction between the eligibility decision and the selection decision was well understood by the time of *Apprendi*. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-973 (1994). By disclaiming any conflict with *Walton*, *Apprendi* strongly implied that the "statutory maximum" for murder in Arizona is death and that the additional requirement to find an aggravating factor would not be subject to *Apprendi*'s requirements. The Court later decided in *Ring*, 536 U. S., at 602-603, that *Apprendi* was wrong on this point and overruled *Walton* and, implicitly, this part of *Apprendi*. However, *Ring* was not decided until after the judgment in the present case became final. As of the finality date, it was quite possible that this Court would reconcile the cases by taking a more nuanced view of what constitutes the statutory maximum for *Apprendi*.

Finally, there is the concluding footnote. See *Apprendi*, 530 U. S., at 497, n. 21. The *Apprendi* Court disclaims any ruling on the Federal Sentencing Guidelines "beyond what this Court has already held." This is followed by a quote from *Edwards*, 523 U. S., at 515, noting that "a maximum sentence set by statute trumps a higher sentence set forth in the Guide-

lines." This quote implies that statutory maximums and Guidelines maximums might be considered as different for *Apprendi*'s rule. Further, reasonable minds could conclude that guidelines systems are distinguishable from sentence enhancements regardless of whether the guidelines are enacted by a legislature directly or issued by a commission and given mandatory force by a legislature.

Apprendi involved a sentence enhancement which bore a strong resemblance to a higher degree of offense. A specific, statutorily defined fact had to be found to make the defendant eligible for a sentence he could not have been given without that fact. *Blakely* extended that rule to a system where there is a wide statutory range, a more limited standard range, and discretion to depart from the standard range upon a finding of justifying reasons which need not be listed in any statute. See *Blakely*, 542 U. S., at 299 (listed factors are illustrative, not exhaustive). This was a dramatic expansion of the *Apprendi* rule. The fact that it may have been a predictable development does not mean that it was not new. See *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). *Blakely* v. *Washington* created a new rule within the meaning of *Teague* v. *Lane*.

B. AEDPA.

On March 22, 2001, 17 days after the judgment in this case became final for *Teague*, the Washington Supreme Court decided *State* v. *Gore*, 143 Wash. 2d 288, 21 P. 3d 262. On July 16, 2002, a commissioner of the Washington Supreme Court denied review of a Court of Appeals decision dismissing Burton's personal restraint petition. App. to Brief for Petitioner 3a. A state-law claim was rejected on the ground of prior adjudication, but the *Apprendi* claim was rejected on the merits, citing *Gore*. On October 8, 2002, the court denied petitioner's motion to modify that ruling. App. to Brief for Petitioner 4a.

The Washington Supreme Court's October 2002 ruling can be fairly read as a disposition on the merits. The inference is

stronger here than it was in *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991), where the Court adopted a "look-through" presumption that an unexplained refusal to review a lower court ruling is on the same ground as the last explained disposition.

The question of whether a rule was "clearly established" under AEDPA at a particular point in time is substantially the same as the question of whether it was "new" for *Teague* purposes, see *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), but the two rules look to different points in time. While *Teague* looks at the law as of the date of finality on direct appeal, see *supra*, at 13, § 2254(d) looks to the state of the law at the "time of the relevant state-court decision." *Ibid.*

Most of the argument that *Blakely* was a new rule under *Teague* also applies to the argument that the *Blakely* rule was not clearly established at the time of the relevant state-court decision. The one important change in the legal landscape in the interim was *Ring* v. *Arizona*'s overruling of *Walton* v. *Arizona*. Although *Ring* indicates that the Court was inclined to construe "statutory maximum" more expansively than it would have appeared from *Apprendi* on its face, it did not go so far as to clearly establish that the Court would pull the rug out from under decades of noncapital sentencing reform. Capital sentencing had been driven by this Court's case law with legislatures enacting whatever they thought would pass muster, while noncapital sentencing reform had been enacted by legislatures that believed they had wide latitude to adopt reforms they believed to be wise policy. *Ring*'s about-face on *Walton* might have been a development limited to the arcane world of capital sentencing.

As the reaction to *Blakely* described *supra*, at 14, indicates, *Blakely* was the biggest leap in the series from *Apprendi* to *Booker*. Before *Blakely*, "statutory maximum" was known to encompass sentence enhancements such as in *Apprendi* and eligibility for the death penalty as in *Ring*, but its application to a guidelines range contained within a broader overall statutory range was not clearly established.

The Washington Supreme Court's decision in *Gore* that *Apprendi* did not apply to its guidelines system was ultimately held to be incorrect, but that is not sufficient to make it an "unreasonable application" of *Apprendi*. See *Williams*, 529 U. S., at 412. The "precise contours" of the *Apprendi* rule were unclear, cf. *Lockyer* v. *Andrade*, 538 U. S. 63, 72-73 (2003), especially as applied to a guidelines system, because *Apprendi* did not decide whether the "statutory maximum" in such a system was the top of the guidelines range or the outer statutory limit.[4]

State v. *Gore* was neither contrary to nor "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), as of October 2002. Neither was the state court's rejection of Burton's claim based on *Gore*. The criterion established by Congress for collateral attack on a final state criminal judgment has not been met.

IV. The *Blakely* rule is not an "absolute prerequisite to fundamental fairness."

A. In General.

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), limiting the retroactivity on habeas of new rules of criminal procedure has an exception[5] which is often sought and never found in this Court's *Teague* cases. The exception has been described in different ways, but the phrase that captures it best is that it is

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4. Even if *Apprendi* had said something on a issue not presented by the case, it would have been dictum and not holding, and dictum does not establish law for the purpose of § 2254(d)(1). See *Williams*, 529 U. S., at 412.

5. Substantive rules, previously considered the "first exception," are now considered to be simply outside the scope of the rule. See *Beard* v. *Banks*, 542 U. S. 406, 417, n. 7 (2004). *Blakely* is obviously not substantive. See *Butler*, 494 U. S., at 415.

for new rules which are an "absolute prerequisite to fundamental fairness." *Id.*, at 314; *Sawyer* v. *Smith*, 497 U. S. 227, 244 (1990) (quoting *Teague*); *Beard* v. *Banks*, 542 U. S. 406, 419 (2004) (quoting *Sawyer*).

Aside from such general expressions, the Court has illustrated the exception by comparison. Since *Teague* itself, the Court has "referred to the rule of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel), and only to this rule," *Banks*, 542 U. S., at 417, as an example of the magnitude required. If the rule lacks "the primary and centrality of the rule adopted in *Gideon*," *id.*, at 420 (quoting *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990)), it does not qualify for the second exception. On the *same day* that the Court decided *Blakely*, the Court also declared, "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception," *ibid.*, and "it is unlikely that any . . . ha[s] yet to emerge." *Schriro* v. *Summerlin*, 542 U. S. 348, 352 (2004) (internal quotation marks omitted).

Teague itself did provide a few examples besides *Gideon*. *Teague*, 489 U. S., at 313-314, quoted Justice Stevens' examples of fundamental rules from his dissent in *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982):

> "This category cannot be defined precisely; concepts of 'fundamental fairness' are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence;[9] that the prosecutor knowingly made use of perjured testimony;[10] or that the conviction was based on a confession extorted from the defendant by brutal methods.[11]

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9. *Moore* v. *Dempsey*, 261 U.S. 86.

10. *Mooney* v. *Holohan*, 294 U.S. 103.

11. See *Brown* v. *Mississippi*, 297 U.S. 278 (direct appeal)."

These examples further flesh out what is required before a rule qualifies as an "absolute prerequisite to fundamental fairness." The practice forbidden by the rule must transform the trial into a mockery of justice.

Are the sentencing guidelines systems enacted as reforms by Congress and by the legislatures of numerous states over the last couple of decades, see *Blakely*, 542 U. S., at 323 (O'Connor, J., dissenting), such travesties of justice as to be in the same league with brutally extracted confessions, knowing use of perjured testimony, mob-dominated trials, or pitting an illiterate layman against an educated, experienced trial lawyer? The question answers itself.

The *Apprendi* opinion waxes nostalgic for common law sentencing, when the prescribed punishment for all felonies—death—followed directly from the jury verdict. See *Apprendi*, 530 U. S., at 478.[6] The members of the First Congress were not nearly so enamored of common law sentencing. They replaced it eight months after they proposed the Bill of Rights.

On April 30, 1790, Congress enacted "An Act for the Punishment of certain Crimes against the United States," 1 Stat. 112. The only crimes for which a defendant could predict the punishment with certainty from the indictment, cf. *Apprendi*, 530 U. S., at 478, were the capital ones. For example, murder in a federal enclave was punished by death, period, under § 3 of the Act, and benefit of clergy was abolished by § 31. Noncapital crimes had only maximums, leaving to the judge the choice of any lesser sentence. Under § 7, for example, the punishment for manslaughter was imprisonment "not

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6. In reality, since the early 1700's all first offenders for most felonies were eligible for a greatly mitigated punishment through "benefit of clergy," and juries had very little to do with determining eligibility for that mitigation. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 3-8, available at http://www.cjlf.org/briefs/Ring.pdf.

exceeding three years" and a fine "not exceeding one thousand dollars."

Judicial discretion to sentence within a range was thus a feature of federal criminal law—the only law to which the Sixth Amendment originally applied—before that amendment was ratified. *Williams* v. *New York*, 337 U. S. 241, 251 (1949), confirmed what had already been long understood, that the facts determining choice of sentence within a range may be determined by the judge and are not subject to any particular standard of proof or rules of evidence. The sentencing reforms at issue in *Blakely* and *Booker* had statutory outer ranges of sentences for each crime or class of crimes, similar to those that existed in the pre-reform systems, coupled with an inner range from which the judge could not depart without an objective reason. See *Blakely*, 542 U. S., at 299; *Booker*, 543 U. S., at 234.

Considered in isolation, the requirement that the facts supporting an upward departure must be found beyond a reasonable doubt might be considered important to an accurate determination of the sentence for which the defendant is legally eligible. However, *Sawyer* v. *Smith*, 497 U. S. 227 (1990), tells us that enhancement of accuracy is not enough and that considering the change in isolation is error.

Most new rules created in recent times have enhanced the accuracy of the trial. This is particularly true in the sentencing area. *Sawyer*, 497 U. S., at 243, noted that extending retroactivity to new capital sentencing rules that enhance accuracy would amount to a practical overruling of the holding of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that *Teague* applies to the penalty phase. Incremental improvements in accuracy, even improvements of "systemic value," *Sawyer*, *supra*, at 244, are not enough.

The change must be considered in the environment of preexisting rules. See *ibid.* It must be considered *in vivo* and not *in vitro*. *Sawyer* held that the prosecutor comment rule of

Caldwell v. *Mississippi*, 472 U. S. 320 (1985), was not an " 'absolute prerequisite to fundamental fairness,' " 497 U. S., at 244 (quoting *Teague*), given that pre-*Caldwell* defendants had the protection of the due process rule of *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974).

Given that the State of Washington could have authorized the judge to sentence *Blakely* anywhere in the outer range set by statute for his crime for any reason or no reason, was a system that restricted the judge to an inner range in the absence of undefined aggravating circumstances fundamentally unfair? The number of legislatures that enacted such reforms in the sincere belief that they were *improving* the fairness of sentencing refutes such a notion. See *Blakely*, 542 U. S., at 323 (O'Connor, J., dissenting) (numerous systems); *id.*, at 326-327 (Kennedy, J., dissenting) (need to respect collective wisdom of legislatures). In Congress, the Sentencing Reform Act was the product of a remarkable bipartisan coalition including such ideologically polar opposites as Senators Strom Thurmond and Edward Kennedy. See Brief for Sens. Kennedy, Hatch, and Feinstein as *Amici Curiae* in *United States* v. *Booker*, No. 04-104, pp. 12-15.

It is one thing to hold, as *Blakely* and *Booker* did, that this broad national legislative consensus was mistaken as to what the Sixth Amendment permits. It would be quite another to hold, as petitioner asks, that the system so created was so fundamentally unfair as to be in the same league with the practices at issue in *Gideon*, *Moore*, or *Brown*. See *supra*, at 21. The rule of *Blakely* does not qualify for the second *Teague* exception.[7]

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7. *Amicus* CJLF has argued in another case presently before the Court that the time has come to declare outright what the Court has previously hinted. There are no rules of *Gideon* magnitude remaining to be made and there have not been for a long time. The second *Teague* exception should be formally laid to rest. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, p. 12, available at http://www.cjlf.org/briefs/Bockting.pdf.

B. Schardt v. Payne.

Amici supporting the petitioner cite the case of *Schardt* v. *Payne*, 414 F. 3d 1025 (CA9 2005),[8] as "the paradigm example" of *Blakely* as an innocence-protection rule. See Brief of National Association of Criminal Defense Lawyers and Washington Association of Criminal Defense Lawyers as *Amici Curiae* 7 ("NACDL Brief"). Actually *Schardt* is an example of the injustice that would be caused by applying *Blakely* retroactively.

Schardt was a resident child molester who victimized B.E., the 10-year-old daughter of his live-in girlfriend, repeatedly, several times a month for more than a year. See 414 F. 3d, at 1027-1029. The jury found at least one specific act of rape to be proven beyond a reasonable doubt. See *id.*, at 1029. *Amici*, represented by counsel for Schardt, quote the State's sentencing memorandum that although B.E. could vividly remember repeated molestations, she was unable to pinpoint them in time or separate out her memories of Schardt's numerous victimizations of her. See NACDL Brief 9-10.

From the fact that the State could not prove these other molestations as separate crimes, *amici* leap to the conclusion that *Blakely* would have changed the result had it been in effect at the time of the trial. NACDL Brief 11. That conclusion does not follow. *Blakely* changed who must decide sentence-eligibility facts and the burden of proving them, but it did not change the substantive facts which must be proved. If under Washington law a course of repeated molestations over a period of time without identifying specific instances was an aggravating fact authorizing an exceptional sentence before *Blakely*, it still is after *Blakely*.

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8. Schardt filed a certiorari petition and motion to proceed in forma pauperis on November 10, 2005, in case No. 05-9237. The motion was denied on May 30, 2006, and Schardt was given until June 20 to pay the fee and submit a printed petition. He apparently did not, and the online docket indicates the case was considered closed on June 29.

What would happen, in real terms to real people, if Schardt's 17-year sentence for this 1997 crime were overturned by retroactive application of *Blakely*? Either B.E. would have to endure testifying to these traumatic events again at resentencing, or Schardt would have his sentence reduced to 8½ years, see 414 F. 3d, at 1029, meaning immediate release with the very substantial possibility of preying on another child. Neither B.E. nor that other child should have to endure this. Schardt, like Burton, was properly sentenced for the crime he committed under a fair system operating in accordance with the Sixth Amendment as it was understood at the time.

V. The prior adjudication rule of AEDPA does not incorporate the *Teague* exceptions.

Regardless of whether the *Blakely* rule qualifies for the second *Teague* exception, there is no such exception to 28 U. S. C. § 2254(d)(1). *Amicus* CJLF has fully presented this argument in the *Bockting* case, so we will simply incorporate it here by reference. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, pp. 13-23, available at http://www.cjlf.org/briefs/Bockting.pdf.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be vacated and the case remanded with directions to dismiss for lack of jurisdiction, or else the writ of certiorari should be dismissed as improvidently granted. If the Court does reach the merits, the decision should be affirmed.

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Respectfully submitted,

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